

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Petition of)
)
AMIGO.NET)
)
For Declaratory Ruling Regarding the Effect)
of Sections 253 and 257 of the Telecommunications)
Act of 1996 on an Agreement)
for Multi-Use Network: Infrastructure)
Development, Statewide Telecommunications)
Service Aggregation, and Network Management)

CC Docket No. 00-220

To: The Commission

**REPLY COMMENTS OF AMIGO.NET IN SUPPORT OF ITS
PETITION DECLARATORY RULING AND INJUNCTIVE RELIEF**

Pursuant to the Public Notice released November 20, 2000 in the referenced proceeding and the Commission Order released December 8, 2000, Petitioner, Amigo.Net ("Petitioner") hereby submits its Reply in Support of its Petition for Declaratory Ruling and Injunction Pending Ruling (the "Petition"). Notwithstanding arguments to the contrary, the contract (the "Contract") between the State of Colorado ("Colorado") and Qwest Communications International Inc. ("Qwest") violates sections 253(a) and 257(b) of the Telecommunications Act of 1996 (the "Act"). The Contract requires Qwest, as a single contractor, to develop 70 statewide Aggregated Network Access Points ("ANAP(s)") and charge a statewide uniform rate for ANAP services. As is demonstrated more fully below, the Contract is a legal requirement under section 253 of the Act and has the effect of prohibiting competing telecommunications service providers.

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Petitioner, from providing telecommunications service in rural areas in Colorado. Accordingly, it is in violation of section 253(a) of the Act. Also, none of the section 253(b) exemptions apply. Moreover, the adverse competitive effect of the Contract on small businesses violates section 257 of the Act. Therefore, Petitioner respectfully requests that the Commission utilizes its preemption power pursuant to section 253(d) of the Act and grant the Petition.

I. THE CONTRACT VIOLATES SECTION 253 OF THE ACT.

A. The Contract Falls Within the Scope of Section 253

Section 253 provides:

No State or local statute or regulation or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

47 U.S.C. § 253(a).

To determine whether an agreement violates section 253, the Commission will first consider whether it falls within the scope of section 253. If the agreement falls within the scope of section 253, the Commission will then examine whether the agreement may prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications service. *In the Matter of the Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on and Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way ("Minnesota Order")*, 14 FCC Rcd. 21697 (1999).

“If the [a]greement has that effect, the Commission must preempt it unless the [a]greement comes within the terms of the exceptions Congress carved out in sections

253(b) and (c) [of the Act].” *Id.* at ¶ 11. It is the effect of the state action that matters -- not the purpose.

Colorado completely misconstrues the applicability of section 253. It argues that section 253 is applicable only when a contract or regulation prevents competitors from providing telecommunication services “either by expressly prohibiting certain carriers from providing such services or by imposing specific network construction burdens on certain carriers that have the effect of prohibiting them from providing telecommunications services to the public.” *Colorado Comments* at 10. This interpretation is wholly erroneous because it unnecessarily narrows the breadth of section 253.

Without question, express prohibition from providing telecommunication services and burdensome network construction requirements implicate section 253. Indeed, the instant matter does concern burdensome network construction requirements because the single provider requirement automatically eliminates small telecommunication service providers on the basis of financial strength. As the Commission noted in the *Minnesota Order*, in the *Texas Preemption Order*,¹ “[a]s a second independent basis for the decision, the Commission found that enforcement of the build-out requirements would have the effect of prohibiting certain carriers from providing any telecommunications service contrary to section 253(a) because ‘the substantial financial investment’ required to meet the build out requirement effectively precluded any entry at all.” *Minnesota Order* at ¶ 21 (citing *Texas Preemption Order*, 13 FCC Rcd 3498, ¶ 78. By seeking a single

¹ *In the matter of The Public Utility Commission of Texas et al., Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, (“Texas Preemption Order”)* 13 FCC Rcd. 3460 (1997).

provider to be the prime contractor on all 70 statewide ANAPs, the Contract effectively limits the group of bidders to only those firms sufficiently capitalized to undertake such a project. It clearly excludes small competitors who are capable of developing individual ANAPs, but who do not have sufficient capital to undertake the project on a statewide basis. On that basis, this issue falls within the scope of section 253.

Further, section 253 may be implicated in other ways. As the Commission has specifically noted, “[s]ection 253(a) was meant to capture a broad range of state and local actions that prohibit or have the effect of prohibiting entities from providing telecommunication services.” *Minnesota Order* at ¶ 18 (emphasis added). In other words, “[w]hether the state or local requirement affected the provision of telecommunications services [is] the important issue, not the purported subject matter of the restriction.” *Id.* at 15. As stated in the Petition, because the Contract eliminates competition in the provision of ANAPs in rural areas and artificially lowers the price of ANAP services in rural areas below their actual cost, it prevents smaller competitors from effectively competing in the rural areas. To suggest as Colorado does, that a section 253 inquiry is limited to those two instances, is plainly inaccurate.

B. The Contract Does Create a Legal Requirement.

Colorado, frankly, gets it wrong by arguing that the Contract does not create a legal requirement. *Colorado Comments* at 10.² It is not necessary that the state action be a statute or a regulation. *Minnesota Order* at ¶ 17. It is sufficient, for the purposes of establishing that a legal requirement exists, that the state action legally binds the state to

² Indeed, Colorado’s comments are internally contradictory on this point. At page 7, it acknowledges that the Commission “must preempt” a contract that “affects the ability of other entities to provide telecommunications services.”

deny other entities the ability to perform the subject matter of the Contract. *Id.* Here, the Contract is an exclusive contract with a single contractor to construct all 70 statewide ANAPs and to provide related services. The exclusive nature of the Contract legally binds the state to deny other entities, such as Petitioner, the right to contract with the state to provide ANAP services. Moreover, the flat rate pricing requirements of the Contract appear to subsidize Qwest's service in rural areas and, in effect, would make it difficult for Qwest's competitors, like Petitioner, to compete with Qwest in the rural areas.

Colorado contends that the Contract should be excused from preemption because it is "purchasing the construction and management of a telecommunications network and associated advanced telecommunications services from Qwest for its own use." *Colorado Comment* at 10. However, casting the issue as a "traditional government procurement" does not obviate the need for section 253 scrutiny. Of paramount importance is the language in the *Minnesota Order* that expressly notes that a contractual arrangement between a state and a private entity, even if such an arrangement is made pursuant to state procurement laws, is subject to section 253 scrutiny. *Minnesota Order* at 17. Consequently, to the extent that Colorado claims that the Contract is following the state procurement laws, it is also subject to section 253 scrutiny.³

³ As a separate matter, Colorado offers no insight whatsoever as to what it means by "traditional government procurement." *Id.* Colorado appears to focus on the language in the *Minnesota Order* stating that "[t]his is different from a traditional government procurement of telecommunications facilities or services," to suggest that the Contract is not subject to section 253 scrutiny. This contention is flatly inaccurate. That statement in the *Minnesota Order* was merely in response to the argument that state procurement laws, not the specific contractual arrangements, are subject to section 253. That was not a statement that traditional government procurement is categorically exempt from section 253 scrutiny. The critical fact is that Qwest, as a single exclusive provider, will have the ability to adversely affect competitors that do not have the opportunity to provide ANAP services. *Id.* at ¶ 19.

C. The Single Bidder Requirement Has the Effect of Prohibiting Competitors From Providing Telecommunications Services.

Although, in theory, smaller companies were not prevented from bidding on the services, in reality, they could not. There is no dispute that the bid scheme contemplated a single award to one prime contractor. Encouraging or even requiring partnership with subcontractors however is not a substitute for competition. The pertinent portion of the Request for Proposal (“RFP”) states that “the State assessment will view the use of local partnerships and subcontractors, for example, as a means of demonstrating local understanding.” *State of Colorado – Request for Proposal*, Art. 3, ¶ 3.2.1. The RFP did not require Qwest to use subcontractors; it merely gave Qwest an option to use them. Indeed, in the letter responding to Amigo.net’s protest of the RFP, the State responded that “the Prime Contractor *may* require the use of subcontractors.” *Colorado Comments, Att. E., Letter from Jane Lopez to Kenneth Swinehart, Item No. 6*, (emphasis added). Clearly, Qwest is not bound to engage subcontractors. It is equally unavailing that Qwest has entered partnerships with Cisco systems and other telecommunications industry companies. *Colorado Comments* at 11. By definition, collaborating with a prime contractor is not tantamount to competition between Qwest and the smaller telecommunications providers in its market. Indeed, given the stringent financial requirements of the RFP, it is no surprise that only five telecommunications providers submitted bids. *Colorado Comments* at 6, n. 1. Undoubtedly, a single provider scheme necessarily presents the potential that smaller providers will be shut out of the market.

D. The Flat Rate Pricing Is Also a Bar to Competition.

By Colorado’s admission, the Contract does employ a flat rate pricing scheme. How the Contract came to be based uniform statewide pricing is inconsequential. What

is instructive, for the purposes of section 253, is the adverse effect of the pricing mechanism on the ability of competing telecommunications providers to provide services, even if there is no intent to produce such a result. Thus, Colorado's assertion — that it “simply approved” the Contract but did not require uniform statewide pricing in the RFP - has no bearing on the issue at hand. *Colorado Comments* at 12.

Besides, it merits noting that Colorado appears to have encouraged such pricing. During the procurement process, Mr. Borrego, Communications Manager for Colorado Information Technology Services, wrote a letter to Amigo.net stating that Colorado “will be asking for flat rate pricing,” that flat rate pricing was not contrary to the Act, and that flat rate pricing “could be the only way that rural areas can afford advanced services.” *Petition* at 4-5. While this written RFP did not literally require it, Colorado does not dispute Mr. Swinehart's statement in his affidavit that the State continued to encourage bids that would employ such pricing. *Petition*, Appendix 8.

As Petitioner points out in the Petition, a statewide uniform rate will impede competition because it will subsidize costs in rural areas for Qwest. *Id.* at 11-13. Because of the subsidization of costs, rural customers would be attracted to Qwest's rates which, by definition, would be lower than its costs of providing ANAP services in rural areas. *Id.* Consequently, Petitioner and similarly situated rural area services providers, who are now providing services and whose rates would reflect higher costs, would be unable to compete with Qwest.

Moreover, as the Petition points out, Colorado loses economic efficiency by not allowing multiple bids at each proposed ANAP location. It could have been that, by allowing multiple bids at each individual ANAP location, Colorado would have

maximized competition at each location and therefore benefited from such competition in the form of lower prices. By opting for a single bid scheme however, it may wind up paying more to Qwest in total contract price. The state offers not a shred of evidence to dispute this point or to suggest that it even studied the issue.

Colorado also defends the Contract on the grounds that Petitioner has not suffered any harm. It states that Petitioner does not state that it could have provided all of the requested services at a lower price; did not submit any cost studies or other meaningful, substantive and probative evidence; and did not even submit a bid. *Colorado Comments* at 13. This argument is tenuous at best.

First, it is the potential harm to competition that is relevant, not actual harm. *Minnesota Order* at ¶ 19. The policy rationale is particularly sound here because Petitioner may not realize the harmful competitive effects until the ANAPs in Petitioner's market are operational. Second, Petitioner's illustration in the Petition demonstrates convincingly that a subsidization of costs in the rural areas has potentially harmful effects to competition. *Petition* at 12-13. Third, Colorado points to no law (indeed, there is none) requiring that, before challenging the legality of the Contract, Petitioner must have submitted a bid for the Contract.

Colorado asserts that other states are engaged in similar procurement schemes. That is not at all clear. *Colorado Comments* at 14, Att. A, App. D. The summary of the status of other states' initiatives attached to Colorado's comments does not indicate whether those states that have completed their processes used single bids. As to the states whose bid schemes are in process, there is also insufficient indication whether those states are employing the single contractor scheme or whether such a scheme has been

ruled legally valid. In any event, the fact that other states are engaged in efforts to extend advanced telecommunications services to rural areas plainly cannot form a justification for Colorado's actions. If anything, the fact that many states are contemplating updates to their telecommunications networks underscores the competitive harm that may be caused to smaller service providers, such as Petitioner, throughout the country if similar bid schemes and contractual arrangements are used by other states.

E. The Contract Does Not Fit Under the Exceptions in Section 253(b) of the Act.

Section 253(b) provides:

Nothing in this section shall affect the ability of a state to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, and ensure the quality of telecommunications services, and safeguard rights of consumers.

47 U.S.C. § 253(b).

The Contract clearly does not satisfy the competitive neutrality requirement of section 253(b). The Contract grants a single entity, Qwest, the exclusive right to develop ANAPs and provide related services to the State of Colorado. Because of the substantial capital investment required to undertake such a project, a certain class of competing telecommunications providers – specifically small competitors – could not bid on the project and therefore were prevented from providing such a service to the state. Moreover, the statewide uniform pricing mechanism of the Contract will likely create an artificial price subsidy in rural areas, which will make it impossible for current (and potential) rural area service providers to compete. Accordingly, Colorado cannot validly claim that the Contract is competitively neutral. Because the Contract is not

competitively neutral, it does not fit within a section 253(b) exemption. *Minnesota Order* at ¶ 54.

Colorado's argument that the Contract is necessary to the development of advanced telecommunications services in rural areas bears no relevance to the issue of whether the Contract fits a section 253(b) exemption. No one disputes the merits of an integrated statewide telecommunications network. Petitioner, in fact, supports the objectives. *Petition* at 3. The issue here is whether the single contractor scheme is "necessary" to accomplish any of the objectives identified in section 253(b). Colorado has not shown that to be the case. Therefore, it does not and cannot qualify under any of the section 253(b) exemptions.

II. THE CONTRACT ALSO VIOLATES SECTION 253(b) OF THE ACT.

As stated in the *Petition*, the Commission has an obligation to eradicate impediments to the entry of small businesses that adversely affect competition in the marketplace. *Petition* at 15. The Contract is such a barrier because it denies small business, such as Petitioner, the ability to effectively compete for provision of telecommunications services in the rural area marketplace. As detailed in Mr. Swinehart's affidavit, the Contract will have an adverse competitive impact on existing providers, who, as Mr. Swinehart explains, are eminently providing advanced telecommunications services in rural areas. *Petition* at 15. For the same reasons, potential entrants will be discouraged from entry into the market. Accordingly, the Contract clearly violates section 257.

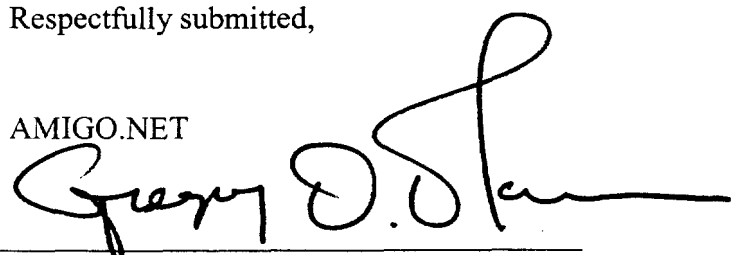
CONCLUSION

For the reasons stated above, Petitioner respectfully asks the Commission to find that the Contract is in violation of sections 253 and 257 of the Act.

Respectfully submitted,

AMIGO.NET

By: _____

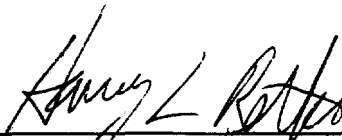

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Dated: December 13, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled in this proceeding.

Dated at Washington, D.C., this 13th day of December 2000.



Harvey L. Reiter